No. 10127

In the United States Circuit Court of Appeals for the Ninth Circuit

THE WASHINGTON WATER POWER COMPANY, A CORPORATION, THE CITY BANK FARMERS TRUST COMPANY, A CORPORATION, AND RALPH E. MORTON, AS TRUSTEE, APPELLANTS AND CROSS-APPELLEES

v.

UNITED STATES OF AMERICA, APPELLEE AND CROSS-APPELLANT

UPON APPEAL AND CROSS-APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the district court (R. 116–132) holding evidence of power site value to be inadmissible is reported in 41 F. Supp. 119.

JURISDICTION

This is an appeal and cross-appeal from a judgment in condemnation entered March 14, 1942 (R. 294–306). Notice of appeal was filed by the condemnee on March 30, 1942 (R. 307), and notice of cross-appeal

by the United States on May 15, 1942 (R. 319–320). The jurisdiction of the district court was invoked by the United States under the Acts of August 1, 1888 (25 Stat. 357, 40 U. S. C. sec. 257), June 17, 1902 (32 Stat. 388), February 26, 1931 (46 Stat. 421, 40 U. S. C. sec. 258a), and August 30, 1935 (49 Stat. 1039). The jurisdiction of this Court rests on section 128 of the Judicial Code as amended, 28 U. S. C. sec. 225 (a).

STATUTE INVOLVED ON THE CROSS-APPEAL

Section 11265, Wash. Rev. Stat., Ann. (Remington, 1932, as amended) [Laws, 1935, c. 30, sec. 7, as amended by Laws, 1939, c. 206, sec. 45, p. 766] provides:

> The taxes assessed upon real property shall be a lien thereon from and including the first day of January in the year in which they are levied until the same are paid, but as between a grantor and grantee such lien shall not attach until the fifteenth day of February of the succeeding year. * * *

QUESTIONS PRESENTED

1. Whether the owner of riparian lands bordering on a navigable stream is entitled to recover compensation for their power site value when such lands are condemned by the United States for the improvement of navigation.

2. Whether the United States, when it condemns land after taxes have been levied and assessed but before a lien attaches as between a grantor and grantee,

is required to pay the amount of those taxes in addition to the agreed reasonable value of the land condemned.

STATEMENT

The United States on December 9, 1939, instituted condemnation proceedings (R. 2–20), accompanied by a declaration of taking (R. 20–31), to acquire from the Washington Water Power Company 330.31 acres of land riparian to the Columbia River at Kettle Falls, Washington—land which was to be flooded by the backwater from the Grand Coulee Dam, a multiple purpose structure designed (among other things) to control the floods, improve the navigability, and regulate the flow of the Columbia River (R. 96). Act of August 30, 1935, 49 Stat. 1028, 1039.

The facts are not in dispute and may be summarized as follows: The lands described in the condemnation petition and declaration of taking are part of a larger tract acquired by the Washington Water Power Company in 1921 at a cost of $150,000 (R. 103, 119, 145). The lands are riparian to the Columbia River, a stream navigable "throughout its entire length in the United States" (R. 44). The condemned area includes 34.09 acres of upland on the right bank in Ferry County, 207.37 acres of upland on the left bank in Stevens County, and two intervening islands (88.85 acres) likewise in Stevens County (R. 31). These lands are so situated that, prior to the construction of the Grand Coulee Dam and the backing of the water 151 miles up the river to the Canadian border (R. 96), there could have been constructed, partly on the lands of the Washington Water Power Company and partly on

lands in the bed of the river, a hydroelectric power plant at an initial cost of approximately $9,000,000 (R. 46, 120).

The parties stipulated, in advance of the trial, that the lands which are being condemned "have a reasonable value for agricultural, grazing, and timber purposes and for all or any other purposes for which they are adapted other than for power site values equal to the amount deposited in the court by the plaintiff as the estimated value of the said tract of land, to-wit: the sum of Seven Thousand Nine Hundred Fifty and 35/100 Dollars ($7,950.35)" (R. 45). At the trial the condemnee proffered evidence of the power site value of the lands in question. The Government objected to this evidence, contending (1) that under the rule laid down in *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, and followed in *Continental Land Co.* v. *United States,* 88 F. 2d 104, certiorari denied 302 U. S. 715, "a riparian owner has no property right in the bed of the stream or to the use of the water or the power inherent therein *as against the United States*[1] and is, therefore, barred from a recovery for any power site value of its riparian lands" (R. 117); and (2) that the condemnee's proposed dam at Kettle Falls would have flooded 518 tracts of privately-owned land in 400 different ownerships (including lands owned by the United States and the State of Washington) and that there was no "reasonable probability that all the ownerships could be combined" (R. 117).

The trial court, after examining the record, briefs, and decision of this Court in the *Continental Land*

[1] Italics supplied throughout this brief unless otherwise noted.

Company case concluded that the evidence offered by the Washington Water Power Company was indistinguishable in principle from the evidence stricken in that case, and, accordingly, sustained the Government's objections (R. 116–132).

The taxing officials of Ferry and Stevens Counties, who had been made parties defendant because of their alleged tax liens against the property being condemned, raised one other issue during the trial. They introduced evidence as to taxes which had been levied (R. 66–70, 79–82) and assessed (R. 73–78, 83–85) in 1939 (payable in 1940), but which had not been discharged. The court decided that the counties could recover these taxes from the Government (R. 115–116).

No issues of fact remaining, the court accordingly directed the jury to return a verdict for the Washington Water Power Company in the amount agreed upon by the parties as the value of the property exclusive of its adaptability for power site purposes, and, in addition, to return tax verdicts for Stevens and Ferry Counties in the agreed sum of $3,003.96 (R. 247–248). The Government excepted to the latter instructions and to the court's refusal to charge the jury that the taxes should be deducted from the stipulated value of the property ($7,950.35). The Washington Water Power Company has appealed from the rulings as to power site value (R. 307), and the United States has filed a cross-appeal on the tax question (R. 319–320).

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SPECIFICATION OF ERRORS RELIED UPON BY CROSS-APPELLANT

The district court erred (R. 321–322):

1. In instructing the jury to bring in verdicts for Stevens County and Ferry County in amounts aggregating $3,003.96, in addition to paying to the defendant Washington Water Power Company the stipulated reasonable value of the property taken, the instructions being as follows (R. 248):

> * * * After the testimony was submitted we had a legal argument here as to the right of the counties to collect the taxes and on the question as to who should pay those taxes, whether they should be paid by the Government or by the defendant, The Washington Water Power Company. That was purely a question of law, and upon that question I decided that the counties were entitled to collect for the taxes for the year 1940, and furthermore decided that the Government would be compelled to pay for those taxes, and there is no question as to the amount, or no dispute as to the amount, and since your function would be to determine the amount and they have agreed upon the amount, I am therefore instructing the jury to return a verdict in favor of the defendant Stevens County in the agreed sum of $1,950.76, and for the defendant Ferry County in the agreed sum of $1,033.20, and I will allow the plaintiff an exception to the ruling and to the direction of the verdict in those amounts in each instance, and I will ask Mr. Calusen to sign the three verdicts on behalf of the jury.

2. In refusing to instruct the jury as follows (R. 282–283):

INSTRUCTION NO. 1

> You are instructed, that the tax liens on lands taken by the United States in eminent domain proceedings do not increase the value of the land which the plaintiff is required to pay therefor.

INSTRUCTION NO. 2

> You are instructed, that the total award or awards which should be made against the United States for the lands condemned in this action (other than Tract No. 2, the Hummel tract) should be the value of the land, that is, the sum of $7,950.35.

INSTRUCTION NO. 3

> You are instructed, that the amount of the tax liens awarded to the counties and required to be paid to them should be deducted from the stipulated value of $7,950.35, in arriving at the amount which should be awarded to the defendant Washington Water Power Company for its interest in the lands condemned.
>
> * * * * *
>
> [R. 249] The Court: * * * I will decline to give the instructions and allow you an exception. * * *

3. In holding that the United States should pay more than the fair market value of the property taken.

4. In holding that the United States should pay the Washington Water Power Company the stipulated

reasonable value of the property taken, $7,950.35, without deducting therefrom the amount of the taxes required to be paid to Stevens County and Ferry County.

ARGUMENT

I

Appellant's lands could have, as against the United States, no inherent market value as a site for a dam across the Columbia River, a navigable waterway of the United States

Appellant contends that the adaptability of its lands at Kettle Falls for dam site purposes gave to the lands an extraordinary value for which the United States must pay compensation, and that the jury should have been permitted to consider this factor in determining the value of the property condemned (Br. 93, 99, 103, 128). The contention is untenable. Appellant's property could not have been utilized for dam site purposes except in conjunction with the bed and the flowing waters of the Columbia River. In other words, the lands were valuable for power purposes because of their raparian location and because of the attendant incidents of riparian ownership. But these riparian advantages, while valuable as between private claimants, are not property rights for which compensation must be paid by the United States when it elects to alter the flow of a navigable river. This is so because any riparian rights which attach to land bordering on a navigable stream exist only in servitude to the navigation powers of the federal Government. These principles are decisive of the case at bar.

A. *Appellant's property was valuable for power purposes only when utilized in conjunction with the flowing waters of the Columbia River.*—It is clear from the record in the instant case that the lands of the Washington Water Power Company could not have been utilized for power purposes except by the construction of a dam and the placing of other structures in and across the bed of the Columbia River and by making use of the flowing waters of that stream (R. 45). In other words, the property had potential power value because of its riparian character and the attendant incidents of riparian ownership. Whatever other advantages it may have possessed as a dam site were as nothing unless the property was used in conjunction with the flowing waters and the bed of the Columbia River.

B. *Riparian rights, though valuable as between private claimants, may be destroyed by a federal improvement of navigation without the Government being liable for compensation.*—It may be conceded that the location of appellant's lands along a great navigable river[2] and the attendant incidents of riparian ownership made the property exceptionally valuable for power purposes in transactions between private persons. See *Boom Co.* v. *Patterson,* 98 U. S. 403 (1878); *Ford & Son* v. *Little Falls Co.,* 280 U. S. 369 (1930); *Ford Hydro-Electric Co.* v. *Neely,* 13 F. 2d 361 (C. C. A.

[2] The parties have stipulated (R. 44), and this Court will take judicial notice of the fact (*Arizona* v. *California*, 283 U. S. 423), that the Columbia River is navigable from the Canadian border to the Pacific Ocean. *Continental Land Co.* v. *United States*, 88 F. 2d 104, 108 (C. C. A. 9, 1937), certiorari denied, 302 U. S. 715.

7, 1926), certiorari denied 273 U. S. 723; *Union Electric Light & Power Co.* v. *Snyder Estate Co.,* 65 F. 2d 297 (C. C. A. 8, 1933), and similar cases cited by appellant (Br. 79–93). But, as the Supreme Court pointed out in *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 70 (1913), cases "which deal with the rights of riparian owners upon navigable or non-navigable streams *as between each other*" may be put to one side when the United States is involved. The Government does not stand in the position of an ordinary condemnor, when in aid of navigation it alters the flow of a navigable river and deprives the upland owner of riparian rights theretofore enjoyed. *W. A. Ross Const. Co.* v. *Yearsley,* 103 F. 2d 589, 593 (C. C. A. 8, 1939); *Great Northern Ry. Co.* v. *Washington Elec. Co.,* 197 Wash. 627, 640, 86 P. 2d 208, 214 (1939).

For example, the Government may deprive an upland parcel of the riparian right of access to navigable water (*Scranton* v. *Wheeler,* 179 U. S. 141, 151, 163; *Gibson* v. *United States,* 166 U. S. 269, 271, 275, 276); it may render the land nonriparian by diverting the river from its old channel to a new (*South Carolina* v. *Georgia,* 93 U. S. 4, 10, 11); and it may deprive such land of all benefits ordinarily derived from the flowing waters of a navigable stream (*United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 62, 72; *South Carolina* v. *Georgia,* 93 U. S. 4, 10, 11)—all without the payment of compensation.

This is so because any riparian rights which attach to lands bordering on a navigable stream exist only in servitude to the navigation powers of the federal

Government.[3] Accordingly, when an improvement of navigation undertaken by the federal Government deprives an upland tract of its riparian rights, the owner is not entitled to recover compensation for the losses thus suffered; "riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation." *Gibson* v. *United States,* 166 U. S. 269, 276 (1897); *Scranton* v. *Wheeler,* 179 U. S. 141, 157 (1900); *W. A. Ross Const. Co.* v. *Yearsley,* 103 F. 2d 589, 592 (C. C. A. 8, 1939), affirmed on another point, 309 U. S. 18.[4] The usual incidents of ri-

[3] In Washington, which differs in this respect from the law generally prevailing elsewhere, an upland owner has no riparian rights even against the state, not to mention the United States. "So complete is the absence of riparian or littoral rights that the State may—subject to the superior rights of the United States—wholly divert a navigable stream, sell the river bed and yet have impaired in so doing no right of the upland owners whose land is thereby separated from all contact with the water." *Port of Seattle* v. *Oregon & W. R. R.*, 255 U. S. 56, 64 (1921).

[4] Appellant would brush these cases aside on the ground that they were actions for damages and that no actual "taking" had occurred (Br. 74–75, 99). This distinction is more illusory than real. In the so-called damage cases there is frequently an actual "taking." For example, when the United States, in order to improve navigation, appropriates a portion of the bed of a navigable stream for a pier, a lighthouse, a breakwater, or a dam, the private owner is completely ousted. But such a "taking" is not compensable under the Fifth Amendment, because the United States is merely exercising a servitude to which the land was already subject. *Scranton* v. *Wheeler*, 179 U. S. 141, 163 (1900); *South Carolina* v. *Georgia*, 93 U. S. 4, 11, 12 (1876); *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 62, 72 (1913); *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 Fed. 9 (C. C. N. J. 1887), referred to with approval in *Scranton* v. *Wheeler*, *supra*, pp. 159–161; *Hawkins Point Light-House* Case, 39 Fed. 77, 83 (C. C. Md., 1889), referred to with approval in *United States* v. *Chandler-*

parian ownership are subordinate to the public right of navigation, and though this qualified interest in the flowing waters of a navigable stream may be "helpful in protecting the owner against the acts of *third parties,* [it] is of no avail against the great and absolute power of *Congress* over the improvement of navigable rivers." *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 62 (1913). One who purchases riparian land with the expectation of enjoying riparian benefits does so at the risk that all such rights may be injured or destroyed without compensation by a *federal* improvement of navigable capacity. Cf. *United States* v. *Chicago, M., St. P. & P. R. Co.,* 312 U. S. 592, 599 (1941). So long as the United States does not interfere, this is a risk worth taking. But it is a risk which is necessarily taken with the knowledge that the Government may at any time so alter the flow of the river as to render the land nonriparian.

C. *Power site value of lands bordering on a navigable stream exists only in servitude to the federal Government's navigation powers.*—The foregoing general principles are, it is believed, a complete answer to appellant's claim that the Government must pay com-

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Dunbar Co., supra; Scranton v. *Wheeler,* 57 Fed. 803, 815 (C. C. A. 6, 1893), reversed upon joint motion of the parties, 163 U. S. 703, but quoted at length in 179 U. S. 141, 144–146 (1900). Similarly, the Government may deprive a tract of all riparian rights by so altering the flow of a navigable river as to render the land nonriparian. If this were done by a private person, it would constitute a "taking" of property protected by the federal Constitution. But if done by the United States, no liability exists, not because the case is one involving "damages" instead of a "taking," but because such property rights exist only in servitude to the federal Government's navigation powers.

pensation for the power site value of the property in question. "The flow of a navigable stream is in no sense private property * * *. Exclusion of riparian owners from its benefits *without compensation* is entirely within the Government's discretion." *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 424 (1940); *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53 (1913). Or, as this Court has said, "riparian owners of shore lands along the banks of a navigable stream do not have *as against the United States,* any interest in or title to the waters which flow in the stream when the United States undertakes to develop it or to improve those water highways for the purpose of advancing and improving navigation." *Continental Land Co.* v. *United States,* 88 F. 2d 104, 108 (C. C. A. 9, 1937), certiorari denied, 302 U. S. 715. These cases, despite appellant's attempt at distinguishment (Br. 94–114), are precisely in point. The Supreme Court in the *Chandler-Dunbar* case held that, in view of the plenary power of the United States over navigation, there could be no property right, *as against the Government,* in navigable water and that a power company was not entitled to compensation for water power values when the United States condemned its dam. And, what is more pertinent to this case, the Court held that the claimant was not entitled to have considered, in determining the value of the upland bordering the river, the possible use of that land as a site for the development of hydro-electric power (229 U. S. at 76):

> Having decided that the Chandler-Dunbar Company as riparian owners had no such vested

> property right in the water power inherent in the falls and rapids of the river, and no right to place in the river the works essential to any practical use of the flow of the river, the Government cannot be justly required to pay for an element of value which did not inhere in these parcels as upland.[5]

Similarly, in *United States ex rel. Tennessee Valley Authority* v. *Longmire* (E. D. Tenn., decided August 23, 1935), a three judge statutory court held that the owners of the site of the Norris Dam were not entitled to compensation for dam-site value. In its award the court expressly found that the Clinch River, on which the dam is located, "is a navigable stream * * * and that therefore the respondent landowners are en-

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[5] Appellant seems to find some comfort (Br. 108–114) in another portion of the opinion in the *Chandler-Dunbar* case holding that the power company was entitled to compensation based upon the availability of its upland for canal and lock purposes (p. 77). But that statement is not pertinent, since the building of the canals "around the stream" (p. 66), for watercraft to pass "around the falls and rapids in the river" (p. 67), did not require the erection of any structure in the river nor the utilization of any riparian rights impressed with a navigation servitude. The Supreme Court quite properly held that for those "portage" values the company was entitled to compensation. Nor is appellant helped by three other cases which it cites (Br. 75–76). The decision in *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312 (1893), is to be distinguished because in that case the Government actually took over the use and operation of structures which it had permitted the company to place in the river. The case of *United States* v. *Lynch*, 188 U. S. 445 (1903) has been overruled, and the decision in *United States* v. *Cress*, 243 U. S. 316, has been "limited to the facts there disclosed," namely, to changes in non-navigable streams where the United States has no navigation servitude. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, 597–598 (1941).

titled only to just compensation for the value of the land taken by the petitioning condemnor *with no additional allowance for the value of the dam site located thereon.*"[6]

That a riparian owner is not entitled to compensation for the power site value of upland bordering on a navigable river, when taken by the United States in aid of navigation, would appear to have been conclusively decided in the *Continental Land* case. Appellant, in attempting to distinguish that case (Br. 94–108), fails to realize that there were two alternative grounds for the decision, a fact apparent from an analysis of the opinion. The Court first quotes with approval Judge Webster's statement that (88 F. 2d 108–109)—

> * * * The decisions of the Supreme Court of the United States are to the effect that riparian owners of shore lands along the banks of a navigable stream do not have *as against the United States,* any interest in or title to the waters which flow in the stream when the United States undertakes to develop it or to improve those water highways for the purpose of advancing and improving navigation. That the land owner so owning these adjoining shore lands is not entitled to have any allowance made to him based upon any title to the bed of the stream or any allowance made to him for any right that he has because of the water running in the navigable stream or its potential water power. * * *

[6] The text of the court's "award" in that case is printed in full in the appendix.

> These owners * * * are not entitled to have that adaptability of this site taken into account for the reason they have neither title to the bed of the stream nor any right to the waters which flow in it *as against the Government* exercising dominant power to improve the stream for navigation purposes, and that they are not entitled to that because it has not been taken from them, and it hasn't been taken from them for the simple reason that they never owned it in the first place.

The Court then observes that it "could well rest affirmance" upon the foregoing statement. But because of the magnitude of the project and the importance of the legal issues involved, the opinion proceeds to quote authorities in support of Judge Webster's statement that the Government may, in aid of navigation, deprive an upland owner of the incidents of riparian ownership without the payment of compensation (pp. 109–110). After demonstrating the soundness of the trial court's reason for excluding evidence of power site value, the Court then states an alternative ground for such exclusion (p. 110):

> It may *also* be said that the lands had no inherent value for the purposes claimed by the appellants, unless in probable combination with other lands, for private use. There is no evidence that there was any reasonable probability of combination in a *reasonably near future,* [italics by the Court] or at all, of these lands for private use.

Hence appellant's effort to distinguish the *Continental Land* case is unavailing. Even conceding *argu-*

endo that appellant, "in the reasonably near future", could have acquired for its Kettle Falls project a flowage easement over 518 parcels of land in 400 different ownerships—state, federal, and private (R. 54)—and that it could have acquired a permit from the Federal Power Commission, still its proffered evidence of power site value was rightly excluded for the reason given in the first portion of this Court's opinion in the *Continental Land* case.[7]

[7] The decision of this Court in *Miller* v. *United States*, 125 F. 2d 75 (1942) affords still another reason for rejecting appellant's offer of proof, and is direct authority against appellant's contention (Br. 77–79, 90, 122–125) that the value of the dam site at Kettle Falls is to be neither enhanced nor depreciated by the fact that prior to the taking of the land in question the Grand Coulee Dam had been undertaken. In that case this Court held that the owner of property was entitled to any enhancement in value occurring between the time a project was commenced and particular property was taken—even though the enhancement was due to the project—on the theory that the value of property is to be determined as of the time of the taking. If this decision is sound, it would follow that the owner would have to suffer the depreciation in value which occurs in the interval after a project is begun and before land is taken. Applying that principle in this case, it is evident that appellant's dam site at Kettle Falls did not in fact have any power value at the time of the taking in December of 1939. With the definite authorization of the Columbia Basin Project by Act of Congress in 1935—four years before this condemnation suit was begun—the dam sites upstream ceased to have any value for power purposes. Every prospective purchaser knew that the site at Kettle Falls would be flooded by the backwater from the Grand Coulee Dam and that no head of water could be developed at that point for hydro-electric purposes. Inasmuch as the Government is contending in the Supreme Court that the *Miller* case was wrongly decided (No. 78, Oct. Term, 1942), the additional ground which that case affords for rejecting appellant's offer of proof is not pressed.

II

No separate judgments for unpaid taxes can be entered against the United States when it acquires property by condemnation

A. *In federal condemnation proceedings the United States pays "just compensation" and nothing more.*— When a tract of land in which various persons have separate interests or estates is taken for public use under the power of eminent domain, the compensation to be paid therefor should be determined as if the property were in a single ownership, without reference to conflicting claims, and then apportioned among the parties according to their respective interests. *Carlock* v. *United States,* 53 F. 2d 926 (App. D. C. 1931); see *Pacific Nat'l Bank* v. *Bremerton Bridge Co.,* 2 Wash. 2d 52, 97 P. 2d 162 (1939); *State* v. *Superior Court,* 80 Wash. 417, 141 Pac. 906 (1914). The compensation awarded is for the land itself and the value of the parts cannot exceed the value of the whole. *St. Louis* v. *Rossi,* 333 Mo. 1092, 64 S. W. 2d 600 (1933); *State* v. *Hall,* 325 Mo. 165, 28 S. W. 2d 80 (1930); *Detroit* v. *Fidelity Realty Co.,* 213 Mich. 448, 182 N. W. 140 (1921). See 2 Lewis, Eminent Domain (3d ed. 1909) 1253; 1 Nichols, Eminent Domain (2d ed. 1917) 707, 708; Orgel, Valuation under Eminent Domain (1936) sec. 107.

When the condemnor has paid into court the fair market value of the land (which, as said before, is

determined without reference to conflicting claims), it is entitled to have all claims paid out of the fund deposited. *United States* v. *Dunnington,* 146 U. S. 338 (1892); *State* v. *Superior Court,* 80 Wash. 417, 141 Pac. 906 (1914). This rule has been applied in numerous cases holding that tax liens must be paid out of the award. *Cobo* v. *United States,* 94 F. 2d 351 (C. C. A. 6, 1938); *Coggeshall* v. *United States,* 95 F. 2d 987 (C. C. A. 4, 1938); *United States* v. *Certain Lands in the Town of Hempstead,* 31 F. Supp. 513 (E. D. N. Y. 1940); *Ross* v. *Kendall,* 183 Mo. 338, 81 S. W. 1107 (1904); *In re Sleeper,* 62 N. J. Eq. 67, 49 Atl. 549 (1901). See *Port of Seattle* v. *Yesler Estate,* 83 Wash. 166, 173, 145 Pac. 209 (1915). Cf. *St. Paul* v. *Certain Lands in St. Paul,* 48 F. 2d 805 (C. C. A. 8, 1931).

Taxes levied and assessed against property do not add to its value. If a tax lien or other encumbrance exceeds the value of the property, the Government can still acquire that property by paying "just compensation," whether that amount is sufficient to discharge all the encumbrances or not. Cf. *United States* v. *Greer Drainage Dist.,* 121 F. 2d 675 (C. C. A. 5, 1941). No state, by a tax lien statute or otherwise, can require the Government to pay more than the Constitution provides—just compensation. U. S. Constitution, Amendment V; *United States* v. *Indian Creek Marble Co.,* 40 F. Supp. 811, 818 (E. D. Tenn. 1941). In short, "the mortgagee or other lienor is entitled to be paid out of the fund, and the party acquiring the

land by condemnation proceedings is entitled to have such payment made out of the fund in exoneration of the land acquired. * * * the lien for taxes stands on the same ground as other liens." *In re Sleeper, supra,* p. 69.

In the instant case, the verdict of $7,950.35 which the jury was directed to return in favor of the Washington Water Power Company represents the market value of the land (R. 45). In fact, there was no other evidence to support a different award. To require the Government to pay to Stevens and Ferry Counties an additional $3,003.96 means that the Government, in order to acquire property by condemnation, must pay more than "just compensation."

B. *If a valid tax lien existed at the date of the taking, it must be discharged out of the condemnation award.*—It follows from the foregoing principles that, if the counties had a valid tax lien against the property on December 9, 1939, the date of the taking, then the taxes must be paid from the condemnation award of $7,950.35 (R. 45, 247). Whether such a lien existed is a matter in which the Government is not directly concerned. Just compensation for the property taken having been paid into court, that money stands in lieu of the land. If a lien existed on December 9, 1939, the date of the taking, the counties are entitled to a share of that money. Otherwise, they are not. How the money is to be distributed is no concern of the condemnor; the Government's legal obligations are discharged when "just compensation" has been ascer-

tained and that sum has been paid into court. *United States* v. *Dunnington,* 146 U. S. 338 (1892).

C. *If no tax lien existed on the date of the taking, none can subsequently arise against the federal Government.*—Section 11265, Wash. Rev. Stat., Ann. (Remington, 1932, as amended) [Laws, 1935, c. 30, sec. 7, as amended by Laws, 1939, c. 206, sec. 45, p. 766] provides:

> The taxes assessed upon real property shall be a lien thereon from and including the first day of January in the year in which they are levied until the same are paid, but as between a grantor and grantee such lien shall not attach until the fifteenth day of February of the succeeding year. * * *

This statute makes it clear that a tax lien upon real estate does not, as between grantor and grantee, attach until February 15 of the year after the taxes are levied. The taxes in question were assessed and levied in 1939 (R. 66, 76, 79, 84). The Government took title to this property on December 9, 1939 (R. 33). Hence, if the United States is a "grantee" under that statute, no lien could have attached as against the Government until February 15, 1940. That a condemnor is a "grantee" under the foregoing statute has been expressly decided by the Supreme Court of Washington. *Bethany Presbyterian Church* v. *Seattle,* 154 Wash. 529, 282 Pac. 922 (1929); cf. *Commissioner of Internal Revenue* v. *Plestcheeff,* 100 F. 2d 62 (C. C. A. 9, 1938). That court's construction of the state statute is, of course, binding on this Court.

Since no tax lien attaches against a condemnor until February 15 of the year following the levying and assessment of the tax, this means that no tax lien can ever arise against this property which the Government condemned and for which it has paid "just compensation", because lands belonging to the United States cannot be taxed by the state of Washington or its political subdivisions. Washington State Constitution, Art. 7, sec. 2; Washington Revised Statutes, Ann. (Remington, 1932), sec. 11111; *Van Brocklin* v. *Tennessee,* 117 U. S. 151, 179–180 (1886); *Clallam County* v. *United States,* 263 U. S. 341, 345 (1923); *Mullen Benevolent Corp.* v. *United States,* 290 U. S. 89, 94–95 (1933).

The case of *United States* v. *Alabama,* 313 U. S. 274 (1941) is no exception to this rule. There a statute of Alabama provided that when property became assessable the state would have a lien upon any property owned by a taxpayer for the payment of all taxes which might be assessed against him, which lien was to continue until such taxes were paid. The United States had acquired by purchase (not by condemnation) property within the tax year, but *after* the lien had attached. By the statute, subsequent purchasers took with notice of the existence of the lien. The Court held that the United States stood in the same position as any other purchaser. In the instant case, the Government took the property *before* the lien attached as against a "grantee". Because of its sovereign immunity from taxation, no tax lien or encumbrance can attach to property after title vests in the United States.

It is accordingly submitted that if the counties had a valid claim for taxes at the time title vested in the United States, the amount thereof should have been taken out of the sum agreed upon as the fair market value of the property. And if no tax lien existed on that date, none can subsequently attach against property held by the United States.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be affirmed insofar as it allows no compensation for power site value, and reversed insofar as it makes separate and additional awards to Stevens and Ferry Counties for 1940 taxes.

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AUGUST 1942

APPENDIX

In the United States District Court at Knoxville, Tennessee

NO. 2799—AT LAW

UNITED STATES OF AMERICA EX REL TENNESSEE VALLEY AUTHORITY

v.

SIOTHA LONGMIRE ET AL.

AWARD OF THE COURT

This cause came on to be heard, as provided by law, before three United States District Judges, the Honorables George C. Taylor, John J. Gore, and John D. Martin, upon the exceptions by both parties seasonably made to the award of the Commissioners herein, and the cause having been heard *de novo* upon the full transcript of the proceedings had before the Commissioners, and upon additional evidence adduced and upon argument of counsel for both parties, from all of which the court finds that the Clinch River is a navigable stream (a question not presented to the Commissioners) and that therefore the respondent landowners are entitled only to just compensation for the value of the land taken by the petitioning condemnor with no additional allowance for the value of the dam site located thereon.

Accordingly it is ordered and adjudged that the respondent landowners are awarded as just compensation for the land taken the sum of $55,000.00, together with interest at six percent per annum on the excess

portion of said award over and above the amount heretofore paid into court from the date of the taking of said property by the petitioning condemnor, to wit, the 14th day of October 1933. In the determination of the award herein made, the court has considered that the costs are to be paid by the petitioning condemnor.

(Signed) GEORGE C. TAYLOR,
U. S. District Judge.
JOHN J. GORE,
U. S. District Judge.
JOHN D. MARTIN,
U. S. District Judge.

8/23/35

A true copy teste:
(Signed) LEE A. BEELER, *Clerk.*
By ROXIE BROGAN, *Dep. Clk.*
[SEAL]

U. S. GOVERNMENT PRINTING OFFICE: 1942